COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION	:	
v.	:	Case No. PERA-C-07-123-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS GRATERFORD SCI	:	

PROPOSED DECISION AND ORDER

On March 15, 2007, the Pennsylvania State Corrections Officers Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board). In the charge, the Union alleged that the Commonwealth of Pennsylvania (Commonwealth) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA). The Union specifically alleged that the Commonwealth engaged in unfair practices when, on November 16, 2007, it informed the Union "for the first time that bargaining unit members with injuries covered by the Heart & Lung Act had to treat with a panel physician for the first ninety (90) days of their injury." (Specification of Charges, ¶ 3).

On May 4, 2007, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing take place on July 26, 2007, in Philadelphia. After many granted continuance requests, a case reassignment to this examiner, and a change in Union counsel, a hearing was held on Monday, December 6, 2010, in Harrisburg. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties timely filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA. (PERA-R-01-153-E, Order and Notice of Election, 2001).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (PERA-R-01-153-E, Order and Notice of Election, 2001).

3. Since 1995, the Commonwealth has required bargaining unit employes, who have suffered work-related injuries and sought benefits under the Heart and Lung Act, to obtain treatment for that injury from a list of medical providers designated by the Commonwealth for the first ninety days after the injury. The Commonwealth has not at any time since 1995 changed that requirement. (N.T. 22).

4. The parties stipulated and agreed that the Commonwealth is still requiring corrections officers at all of its correctional institutions to treat with designated panel physicians for ninety days and that the Commonwealth did not change this practice in 2006 when the Union and the Commonwealth entered a collectively bargained agreement (Agreement) that was titled "MEMORANDUM OF UNDERSTANDING PROVIDING FOR PROCEEDINGS BEFORE THE COMMONWEALTH OF PENNSYLVANIA HEART AND LUNG ACT/ACT 534/ACT 632 GRIEVANCE ARBITRATION PANEL." (Union Exhibit 1, p. 1). (N.T. 17-18, 26).

5. The parties stipulated and agreed that the Union raised the issue of eliminating the requirement of treating with panel physicians for Heart and Lung benefits in a letter dated February 8, 2002. Sometime after that letter, the Union and the Commonwealth held a meeting during which the subject of panel physicians was raised. At the meeting, Commonwealth representatives stated that the Commonwealth did not distinguish between treatment under the Heart and Lung Act and the Workers Compensation Act and that there was no reason at that time to change the procedure of treating with panel physicians for the first ninety days. (N.T. 19-20; Employer Exhibit 1).

6. Section 1 of the Agreement defines its scope as follows:

> This Agreement applies to all proceedings before Arbitrators Ralph Colflesh and Thomas McConnell and any future arbitrators selected by the parties pursuant to Paragraph 10 of the January 31, 2006 Interest Arbitration Award to hear appeals of claims filed pursuant to the "Heart and Lung Act."

(Union Exhibit 1, §1).

7. Section 3 of the Agreement provides, in relevant part, as follows:

> (b) The Claimant shall provide the [Commonwealth] with a list of all medical providers who have provided treatment for the claimed injury and shall execute a medical release authorizing the release of the medial providers' records to the Commonwealth.
>
> (c) The Commonwealth shall have the right to have all claimants examined by a physician of the Commonwealth's choosing.

(Union Exhibit 1, § 3).

8. Section 4 of the Agreement provides, in relevant part, as follows:

> In the event that the Commonwealth should file a Petition to Terminate, Suspend or Modify Benefits or requesting other relief under the Acts pursuant to the terms of this Agreement, it shall serve both the claimant and the Association with a copy of the Petition. Petitions will be scheduled for hearing in the order they are received by the Office of Administration.

(Union Exhibit 1, § 4).

9. Section 3(i) provides that "[o]nce an appeal or a petition is filed a meeting shall be scheduled within thirty days between the Commonwealth and the Association to discuss possible resolutions of claims or petitions." (Union Exhibit 1, Section 3(i)).

DISCUSSION

The Commonwealth first argues that, under Independent State Store Union v. Commonwealth of Pennsylvania, Liquor Control Board, 22 PPER ¶ 22009 (Final Order, 1990), the charge must be dismissed because the arguments and facts that the Union has presented are wholly outside the issues and factual allegations contained in the specification of charges. (Commonwealth's Post-hearing Brief at 2-3).

In Liquor Control Board, the Board sustained the Commonwealth's exceptions to a hearing examiner's order finding an unfair practice based on facts that were not specifically alleged in the specification of charges. The hearing examiner in that case concluded that the Commonwealth engaged in unfair practices when the supervisor misled employes into believing that the union was interfering with promotions when in fact there was a promotion freeze instituted by the Pennsylvania Civil Service Commission. However, "[n]owhere in the specification of charges is there any reference whatsoever, either specific or general, to the activity of the Employer's contract compliance officer in misleading potential bargaining unit employes regarding the cause of the promotional freeze." Liquor Control Board, 22 PPER at 24 (emphasis added). The Board further reiterated that it "has specifically stated that the charging party must by way of its specification of charges put the responding party on notice regarding the precise nature of the conduct which is at issue in the charge." Id. at 24 (emphasis added).

The Board in the Liquor Control Board case also quoted from two other cases which are worth repeating here. In PLRB v. Lawrence County, 12 PPER ¶ 12312 (Final Order, 1981), aff'd, 469 A.2d 1145 (Pa. Cmwlth. 1983), the Board stated as follows:

> We are fully cognizant of due process considerations which arise out of the processing of unfair practice charges. Charges must be sufficiently detailed so as to put a respondent on notice of the specific conduct alleged to have been in violation of the Act, thereby allowing adequate opportunity to prepare and present the defense. Accordingly, a charging party is limited to the presentation of evidence as to the specific allegations contained in the charge as timely amended.

Lawrence County, 12 PPER at 469 (emphasis added). The Board, in Liquor Control Board, further quoted PLRB v. Presbyterian-University Hospital, 4 PPER 70 (Nisi Decision and Order, 1974), which stated that "[t]he Respondent cannot and should not be compelled to defend a charge that asserts one type of alleged improper conduct and at the hearings be confronted with evidence of various other types of alleged improper conduct." Presbyterian, 4 PPER at 71.

In its specification of charges, the Union set forth, in relevant part, the following allegations:

> 3. On or about November 16, 2006, the PSCOA was advised by management for the first time that bargaining unit members with injuries covered by the Heart & Lung Act had to treat with a panel physician for the first ninety(90) days of their injury.
>
> 4. This new term and condition of employment was unilaterally implemented by management, and was done without negotiation with PSCOA.

(Specification of Charges ¶s 3 & 4)(emphasis added).

The evidence presented by the Union at the hearing relates to conduct that is not alleged in the charge. The record shows that the Commonwealth has been requiring bargaining unit members to treat with panel physicians since 1995. At the hearing, the Union stipulated that it sought to change the practice as far back as 2002. The Union also agreed that the Commonwealth did not change this practice in 2006 when the parties entered into the Agreement and that the Commonwealth is still requiring bargaining unit employes to treat with the panel physicians for Heart and Lung benefits. The evidence advanced by the Union at the hearing relates to its current position that the Commonwealth should have ceased this practice upon entering into the Agreement and does not support the allegations in its charge that the requirement of treating with panel physicians for Heart and Lung benefits is a "new term and condition of employment unilaterally implemented by management" in late 2006. Nothing in the charge mentions a negotiated termination of an old policy or the unilateral post-Agreement re-implementation of that policy. Therefore, the Commonwealth did not receive proper notice of the specific nature of the claims sought to be proved at the hearing. Accordingly, the facts presented at the hearing do not support the allegations in the charge, and the charge must be dismissed. Liquor Control Board, supra; Presbyterian, supra; Lawrence County, supra.

Moreover, the Union also failed to meet its burden of proving that the Commonwealth negotiated away the panel physician requirement. The Union argues that the parties agreed upon an extensive set of Heart and Lung procedures which are contained in the Agreement. The Union maintains that the absence of any reference to the physician panels in light of the comprehensive procedures set forth in the Agreement evidences that the parties bargained to eliminate the requirement that injured bargaining unit employes treat with panel physicians. The Union contends that the Commonwealth violated its bargaining obligations when, in November 2006, it informed the Union that it was requiring that employes treat with designated panel physicians contrary to the bargained for Agreement.

The Union is attempting to prove a negative. The Union's case depends on the assumption that bargaining for a "comprehensive" procedure establishes that the parties necessarily bargained the issue of panel physicians. The Union argues that the "former panel doctor practice is conspicuous by its absence in this comprehensive agreement." (Union's Post-hearing Brief at 2). The fact that the parties may have bargained an

extensive procedure for Heart and Lung benefits does not constitute substantial competent evidence to support a finding that the parties bargained to eliminate the practice of requiring employes to treat with panel physicians. By characterizing the Heart and Lung procedures as "comprehensive" the Union has attempted to place the proverbial bunny in the hat and force the conclusion that what is not expressly included was specifically rejected or eliminated by the all-inclusive nature of the procedure. That is an assumption unsupported by the record and one that I am unwilling to make.

The substantial evidence of record clearly establishes that the Commonwealth has consistently and uninterruptedly required bargaining unit employes to treat with designated panel physicians for ninety days after a work related injury to receive Heart and Lung benefits since 1995. The record is clear that there has been no change in that practice or policy since 1995 and that there is no evidence that the parties reached an agreement to change or eliminate the practice. Because nothing has changed, the Union's allegation that it was "advised by management for the first time" of this "new term and condition of employment" is contrary to the record.

Furthermore, as argued by the Commonwealth in its post-hearing brief, the so-called "comprehensive" Heart and Lung procedure is not so comprehensive and, therefore, cannot be deemed an agreement by the Commonwealth to stop the practice of using panel physicians. (Commonwealth's Post-hearing Brief at 4). The Commonwealth argues that "[t]he agreement only addresses the procedures for practicing before the arbitration panel established by the parties to hear and resolve Heart and Lung act benefit disputes." (Commonwealth's Post-hearing Brief at 4).

The Union, however, refers to Section 3 of the Agreement and claims that the Agreement contains provisions that require a claimant to provide the Commonwealth with a list of all medical providers who have treated the claimant for the claimed injury. The Union also notes that, under the same section, the agreement gives the Commonwealth only "the right to have all claimants examined by a physician of the Commonwealth's choosing." This language, argues the Union, affirmatively demonstrates how the parties negotiated to eliminate the mandatory physician panels. The Union contends that the Commonwealth would not need a list of providers if the claimant were required to treat with a panel doctor. Also, the Commonwealth would not have to reserve the right to treat with a Commonwealth physician if the practice of treating with a panel physician remained in place. However, this language does not support the conclusion that the Commonwealth bargained away its right to require employes to treat with panel physicians.

A review of the procedure reveals that, indeed, the Commonwealth is correct in that the scope of Agreement is limited to the procedures for resolving benefit <u>disputes</u>. Section 1 of the Agreement provides that it "applies to all proceedings before Arbitrators Ralph Colflesh and Thomas McConnell and any future arbitrators selected by the parties pursuant to Paragraph 10 of the January 31, 2006 Interest Arbitration Award <u>to hear appeals of claims</u> filed pursuant to the "Heart and Lung Act." (emphasis added). It is within the context of the dispute resolution procedure that the language referred to by the Union in Section 3 must be understood. Sections 3 and 4 of the Agreement clearly provide that the Agreement applies equally to initial claims as well as terminations, suspensions or modifications of benefits sought by the Commonwealth. Regarding terminations, suspensions or modifications of benefits, the claimant has already treated with a physician for his/her injuries, in some cases for a period of time in excess of ninety days, after which the claimant may have sought treatment from different physicians. Moreover, the panel physician policy does not, on this record, preclude a claimant from receiving treatment from other health care providers in addition to the panel physicians. Understandably, the Commonwealth would want those records and opinions in the event of a dispute over benefits. It is equally understandable that the Commonwealth would not know of all the different providers in addition to the panel physicians that the claimant may have treated with for his injuries.

Similarly, the requirement that a claimant be examined by a Commonwealth physician in the event of a dispute also could apply in the context of a termination where the claimant had been treating with his/her own physician after the initial ninety day requirement. The Commonwealth in that case would understandably want an opinion from one

of its own physicians. Again, these alternative interpretations of the Section 3 language, relied upon by the Union, simply demonstrate that the Union's interpretation is one of several possible interpretations and cannot be relied upon to support the conclusion that the Commonwealth bargained away the practice of requiring that bargaining unit employes treat with panel physicians.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Commonwealth of Pennsylvania is a public employer under PERA.

2. The Pennsylvania State Corrections Officers Association is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The Commonwealth has not committed unfair practices within the meaning of Section 1201(a) (1) and (5).

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirtieth day of June, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner